

Ex. 2

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

DENISE CECELIA SIMPSON, et al :
Plaintiffs, :
v. : Civil Action No.
JOHNSON & JOHNSON, et al, : 2016 CA 1931 B
Defendant. :
Washington, DC
January 13, 2017

The above-entitled action came on for a hearing before the Honorable MARISA DEMEO, Associate Judge, in Courtroom Number 311, commencing at approximately 2:35 p.m.

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APPEARANCES:

On behalf of the Plaintiff:
James Green, Esquire
Patrick Lyons, Esquire

On behalf of Defendant PCPC:
James Billings-Kang, Esquire

On Behalf of Defendant Imerys:
Angela Hart-Edwards, Esquire

On Behalf of Defendant Johnson & Johnson:
Chad Coots, Esquire

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P R O C E E D I N G S

THE DEPUTY CLERK: This is calling Denise Cecelia Simpson versus Johnson & Johnson, 2016 CA 1931 B. Parties please --

THE COURT: Parties can you state your names for the record.

MR. LYONS: Good morning, Your Honor. My name is Patrick Lyons and I represent the plaintiff, Ms. Denise Simpson.

MR. GREEN: Good afternoon, Your Honor. My name is James Green. I also represent Ms. Simpson.

THE COURT: All right. Good afternoon.

MR. BILLINGS-KANG: And good afternoon, Your Honor.

Oh, if you will, please.

MS. HART-EDWARDS: Good afternoon, Your Honor. Angela Hart-Edwards for Imerys.

Is it okay if we sit --

THE COURT: Sure. That is fine.

MR. COOTS: Good afternoon. Chad Coots representing Johnson & Johnson.

THE COURT: Okay. Good afternoon.

MR. BILLINGS-KANG: Good afternoon, Your Honor. James Billings-Kang on behalf of the Personal Care Products Council.

1 THE COURT: Okay. Thank you. Everyone can have a
2 seat.

3 All right. So this is here on the Defendant,
4 PCPC's motion to -- special motion to dismiss. So I will
5 have you argue your motion first. And then I will give
6 plaintiff an opportunity to respond. I have reviewed the
7 briefs and the citations within the briefs.

8 MR. BILLINGS-KANG: Can I take some time to move
9 some items from behind?

10 THE COURT: Sure. Not a problem.

11 MR. BILLINGS-KANG: Good afternoon again, Your
12 Honor. James Billings-Kang on behalf of what I will mention
13 as PCPC for the time being. Your Honor, the issue is
14 whether the Anti-SLAPP act protects PCPC's speech. That is
15 some quintessential issue that we have here. And just to
16 give you some background, although I do recognize that you
17 have read the briefs. Essentially, plaintiff is arguing and
18 alleging that her use of Johnson & Johnson's talcum powder,
19 baby powder products -- the Shower to Shower and baby powder
20 products caused her ovarian cancer. With respect to my
21 client, she recognizes that PCPC is a nonprofit trade
22 association. It represents 600 members of whom are the
23 codefendants Johnson & Johnson and Imerys. And she does
24 recognize that my client has no product whatsoever. It
25 doesn't service a product of any kind. It doesn't design,

1 manufacture, advertise or market the product in any way. So
2 there is no, sort of, connection between the manufacturing
3 and creation of the products at issue and my client.

4 And so the allegation here, at least with respect
5 to what speech is at issue here, it comes in the form of one
6 paragraph. And that is paragraph 34, particularly. And
7 that paragraph states that in response -- notably in
8 response to a 1990s -- early 1990s NTP study that is the
9 National Toxicology Program, which is overseen by DHHS. I
10 think its offices are within NIEHS. So again, notably, in
11 response to this government study, the allegation is that
12 with the codefendants, PCPC created this task force -- a
13 talc interested task force to essentially study the issue,
14 put out what they claim as bogus studies to muddle the
15 accuracy of the claim that talc does not create ovarian
16 cancer. They allege that these codefendants, the defendants
17 pooled together to finance this to essentially put out
18 speech that muddles the issue. That sort of makes the claim
19 that there is -- excuse me -- that the claims are
20 scientifically inaccurate. So that is the brunt of their
21 allegations, as well as the fact that they claim the speech
22 at issue or the private communications between my client
23 PCPC, Johnson & Johnson and Imerys. So again it is about
24 communications to the general public; communications to the
25 government, so notably lobbying; and private communications

1 among the defendants concerning the safety of talc. They do
2 concede that these issues revolve around the safety of talc.

3 So the analysis then at least with respect to the
4 Anti-SLAPP Act, as you know, is a two-part step. The first
5 step is can PCPC make a prima facie case that it is
6 protected by the act, that can it demonstrate an act in
7 furtherance of the right of advocacy with respect to an
8 issue of public interest? And if that is met, if PCPC can
9 meet that burden, then the burden shifts. The evidentiary
10 burden shifts back to the plaintiff to prove that she can
11 prove -- demonstrate that she will be likely successful on
12 the merits. Interestingly, that latter -- the second prong
13 is not at issue here. The parties are contesting whether
14 PCPC can make a prima facie case. In other words, the
15 plaintiff has not put forward any evidence of any kind that
16 she will be successful on the merits -- any likelihood of
17 success on the merits. And as we know from the recent Mann
18 case that just came out last month, that standard is similar
19 to a motion for summary judgment standard. And we submit
20 that we have met the prima facie case. We met that burden
21 and therefore the code mandates -- it mandates a dismissal
22 with prejudice, as well as the awarding of attorney's fees.

23 Now, before I proceed with the specifics of the
24 prima facie hurdle, I would like to -- again to announce the
25 bedrock principles of the act, of course. We are here

1 talking about speech and the fact that we need to protect
2 speech as sacrosanct, as constitutionally protected. And so
3 any broad rendering of this act would certainly stifle
4 speech. And taken to its logical extent, plaintiff's
5 argument is essentially saying, well, if an organization or
6 a company is inherently commercial, and, in fact, if there
7 is any hint of commercialism, then that speech is not
8 protected. That is the crux of their argument. But, again,
9 the SLAPP Act -- the Anti-SLAPP Act protects my client from
10 having to stand for trial. This is a quintessential case
11 that concerns discussions private and public regarding the
12 safety of talc, which is easily an issue of public interest.

13 So the first question is: Did my client commit an
14 act in furtherance of advocacy? That is the first step of
15 the prima facie burden. There are three definitions for
16 that particular component. The first component comes from
17 section 16-5501(1)(A)(i) of the DC code and that concerns or
18 that defines this particular component that "Any written or
19 oral statement made in connection with an issue under
20 consideration or view by a legislative, executive or
21 judicial body or any other official proceeding authorized by
22 law."

23 Now, again, paragraph 34 states explicitly that
24 the task force, PCPC's action was in response to a study,
25 the NTP study. And so PCPC's -- that particular action

1 should cover -- and anything related to the task force
2 should cover or should be covered by this particular
3 definition. Now, in response plaintiff will claim, well,
4 no -- yes, the public communications -- we'll concede that
5 perhaps the public communications are protected, but not the
6 private communications. But if you look at the definition,
7 it does not distinguish between public or private
8 communications. It is very broad. It simply says, the
9 statement has to be made in connection -- in connection.
10 That is the nexus defined there. And the nexus is, so long
11 as the communication has anything to do with an issue being
12 considered by the legislative, executive or judicial branch
13 or any official proceeding authorized by law, then that
14 speech is protected. And we know that because of -- as well
15 as the legislative history. Interestingly, the legislative
16 history that Ms. Simpson attached to her opposition includes
17 the testimony from the ACLU, which at page 4, they emphasize
18 that statement -- a statement deserves Anti-SLAPP protection
19 whether it is made in a public place or in a private place.
20 So, again, there is no distinction between public or private
21 that should persuade the Court to not provide the protection
22 for private communications.

23 Additionally, the Court may also look to other
24 jurisdictions for guidance. The DC Circuit has stated in
25 three cases that -- particularly California is somewhere

1 that we should look for guidance, because California has had
2 a 10-year head start on this analysis of Anti-SLAPP motions.
3 It has about 2,000 cases that have analyzed their respective
4 Anti-SLAPP motions. And that amounts to about 85 percent of
5 the jurisprudence involving Anti-SLAPP motions. So in a
6 case, for instance, Rivera against First Databank Inc., 187
7 Cal.App.4th 709, that is 2010. The Court maintained that
8 the focus of the speaker's conduct should be the public
9 interest, nevertheless it may encompass activity between
10 private people.

11 So, again, the distinction between what is public
12 and private is of no moment. It shouldn't be considered, at
13 least with respect to this particular definition. And,
14 again, the complaint presupposes by the way it couches the
15 allegations, it presupposes that PCPC responded to a
16 government activity.

17 The second component or the second definition of
18 advocacy concerns written or oral statement made in a place
19 open to the public or a public forum in connection with an
20 issue of public interest. Again, there are allegations in
21 that specific paragraph of the complaint, 34, mention
22 studies, representations made in a public forum.

23 And finally there is a third catchall definition
24 and that defines advocacy as any other expression or
25 expressive conduct that involves petitioning the government

1 or communicating views to members of the public in
2 connection with an issue of public interest. Again, I
3 submit that the communications at issue, even meet that
4 catchall provision, should not meet the other components of
5 the definition.

6 And so that then leads to the second part of the
7 prima facie analysis, which I think is the most contested
8 argument of the two. And so was -- the question was, was
9 there an issue of public interest encapsulated within PCPC's
10 speech? Ms. Simpson says no, that the thrust of PCPC's
11 speech was directed primarily toward PCPC's commercial
12 interest. Now, I must say that the onus, not even just the
13 onus, but the evidentiary burden is on Ms. Simpson to prove
14 that our speech, during these times, was directed primarily
15 towards our commercial interest. It is not our onus to
16 prove otherwise. And that is from Doe number 1 against
17 Burke, a case from the Court of Appeals in 2014. And I can
18 provide the citation, if the Court would like. That is 91
19 A.3d 1031, DC Court of Appeals 2014, which the Court says,
20 "The anonymous speaker" -- just to give some background, Doe
21 against Burke involved the Wikipedia page. Ms. Burke is a
22 reputable attorney that we all probably know of. And she
23 had sought to subpoena Wikipedia to get the identity of
24 certain editors of a post related to her. And Doe number 1
25 moved to quash that subpoena under the Anti-SLAPP act. And,

1 notably, the Court there noted that the anonymous speaker
2 must also disprove -- excuse me -- just to backtrack, the
3 Court noted "It appears to have been the trial Court's
4 understanding that in order to establish an act in
5 furtherance of the right advocacy on issues of public
6 interest, the anonymous speaker must disprove the commercial
7 motivation, even where such motivation is not apparent from
8 the contents of the speech. This apparent presumption,
9 though, of commercial interest has no foundation in the
10 statute which merely states what an issue of public interest
11 is or is not. Moreover, such a presumption is inappropriate
12 in the context of a prima facie showing for which we have
13 felt that the burden of proof is not onerous."

14 So, again, the Court of Appeals is stating there
15 that it is not PCPC's burden to prove that its speech --
16 these particular alleged speech had some sort of substantial
17 nexus with a pecuniary interest. That burden again lies
18 with Ms. Simpson. And --

19 THE COURT: What page were you citing to just now?

20 MR. BILLINGS-KANG: Sure. That is 1043, is the
21 pinpoint.

22 THE COURT: Okay. Thank you.

23 MR. BILLINGS-KANG: And I have copies of --

24 THE COURT: I have a copy here. I just wanted to
25 make sure I was looking at it.

1 MR. BILLINGS-KANG: Sure.

2 THE COURT: Okay.

3 MR. BILLINGS-KANG: Now, the operative language
4 here that Ms. Simpson is pinpointing to is the definition of
5 public interest, which certainly excludes private speech,
6 that is speech directed primarily towards protecting the
7 speaker's commercial interest, as opposed to commenting on a
8 matter of public significance. So the operative phrase
9 there is directly -- primarily directed -- primarily
10 directed. Primarily being the adverb, which from the OED we
11 know means to the great or greatest degree, for the most,
12 mainly. So, again, Ms. Simpson has to show that the
13 speech -- PCPC's speech for the most part, was for
14 protecting its commercial interest, for the most part,
15 mainly. In other words, Ms. Simpson has to show that
16 commentary concerning the safety of talc was substantially
17 outweighed by its commercial interest. California courts
18 have indicated that when courts look at this particular
19 issue, they should look at it not through the lens of the
20 complaint or the form of the complaint or the colorful
21 language of the complaint, but rather look at the basis of
22 the language here. And that is from -- I am going to botch
23 the name of this plaintiff -- Hecimovich against Encinal
24 School Parent Teacher Organization, 203 Cal.App 4th 450 and
25 that is from 2012. And we also get that from a case which I

1 think I mentioned before actually, the Rivera case.

2 So, again, the Court should objectively look at
3 the complaint, but not formulate the analysis as if through
4 the lens of Ms. Simpson here.

5 Now, they have submitted some evidence, I will
6 concede that. But the evidence is PCPC's website. And they
7 also used the declaration from Mr. Pollak that we submitted
8 with our motion to dismiss. That is the breadth of their
9 evidence to try to show this nexus between PCPC speech and
10 pecuniary interest. Again, there is no allegation that
11 PCPC's speech was perpetuated to advertise its services, to
12 advertise its membership, to advertise some sort of
13 connection with PCPC and the products. Again, the products
14 are not created, designed, manufactured, marketed by PCPC.

15 So let's look at the two types of evidence that
16 Ms. Simpson has proffered. The website. She states that on
17 the website is the mission of PCPC, which is to protect or
18 at least advocate on behalf of its 600 members. And she
19 makes the same point about Mr. Pollak's declaration. Again,
20 he concedes that he represents 600 personal care products
21 members. They each have their own interests. And from
22 there, Ms. Simpson concludes generally that, you know, any
23 speech by PCPC must mean it is commercial -- inherently
24 commercial and therefore deserves no protection of the
25 Anti-SLAPP Act. Now, as I said before, we are walking on

1 dangerous grounds here, if we permit that interpretation.
2 So, again, taken to the logical extent, that argument
3 suggests any organization, especially any trade association
4 cannot seek protection under the Anti-SLAPP act. And as I
5 noted from Doe, the burden is on Ms. Simpson though to find
6 that substantial nexus. And you can't rely on speculation,
7 we know that from Doe. You can't rely on conclusionary
8 allegation. There has to be substantially more. And they
9 have not submitted anything to substantiate that, in fact,
10 PCPC had in mind its commercial interest. For example, did
11 it have in mind its membership dues when it is making this
12 speech? It is tough to make that finding if the connection
13 is that tenuous. And it is tenuous because it, again, is
14 based on a website and Mr. Pollak's declaration about the
15 general structure of PCPC, which we know is a general
16 structure for every trade association. And if that
17 interpretation is true and Ms. Simpson's interpretation is
18 going to be correct, then we have to wonder about the
19 holding for many other case law in this jurisdiction. So,
20 for instance, the Farah case against Esquire Magazine where
21 Esquire Magazine had reportedly put out satire of a book
22 that was being promoted for by Mr. Farah, a book involving
23 the birther movement. And even though that particular
24 publication may inherently have increased traffic to this
25 particular blog, that was of no consequence. The question

1 there was, again, you can't look at it through the lens of
2 the plaintiff, look at it through what is being -- what is
3 the speech here? You have to look at what is the target of
4 the speech. And the target of the speech there was a book,
5 not so much the commercial interest of Esquire Magazine,
6 even though plaintiff claimed that Esquire Magazine was a
7 competitor as well. That was of no consequence. And the
8 same is true of the other magazine cases that we have. So,
9 again, I am just going to botch these names, Abbas against
10 Foreign Policy Group, LLC, 975 F.Supp. 2d1. And that is
11 from the US District for the District of DC in 2013. Again,
12 that was a case involving a publication that had made
13 mention of plaintiff's finances and its purported connection
14 with the PLO.

15 There is another magazine case, Boley against
16 Atlantic Monthly Group 950 F.Supp.2d 249, 2013. That
17 publication involved describing plaintiff as a warlord. And
18 despite the fact that the publications may have somehow
19 increased the circulation and traffic and therefore the
20 commercialism of the speaker, again that was of no moment
21 because the onus is on the plaintiff to prove this
22 connection. And it has to be a target connection. Again,
23 the language says, directed primarily towards. You can't
24 just simply say, hey, look on the website, therefore every
25 speech must mean that it is directly towards trade

1 association's public interest. And I can continue and
2 continue about the consequences of this interpretation.

3 We also have the Rivera case that I mentioned
4 before from California, which I think is very apt. And
5 there, the Rivera family or the family members of the
6 decedent who had committed suicide after taking an
7 antidepressant, Paxil. The defendant had filed an
8 Anti-SLAPP motion. He had essentially created a drug
9 monograph about a number of drugs, not just about Paxil and
10 had a working relationship with Costco where he would
11 publish the monographs and submit them to Costco. Costco
12 would then utilize these monographs as a means to advertise
13 and persuade people to take drugs or convince them to take
14 certain drugs. The Rivera family had indicated that the
15 Paxil monograph that the defendant had created was
16 deceptive, was not holistic, was very confusing and vague,
17 just like Ms. Simpson is claiming our speech somehow is sort
18 of muddling the issue of talc. In that case, even though
19 the defendant had inherent commercial interest in the
20 monograph, he certainly made money off these monographs, a
21 substantial amount with a working relationship with Costco,
22 the Court granted the Anti-SLAPP motion. Because, again,
23 not looking at it through the lens of the plaintiff, but
24 looking at the monograph itself, but what it was targeting.
25 It was targeting Paxil, which was an issue of public health

1 and inexorably an issue of public safety. Excuse me. As a
2 consequence in light of what I just mentioned, Your Honor,
3 we have met the prima facie burden. It is not onerous as
4 the Court has said in Doe. Ms. Simpson has not put forth
5 any evidence besides conclusory evidence like the website
6 and Mr. Pollak's declaration to show there is some sort of
7 nexus that somehow PCPC was thinking about its interest,
8 even though -- again, the complaint said it was responding
9 to the government. And so now the burden is on Ms. Simpson
10 to prove otherwise, to put forth evidence that she will
11 likely succeed on the merits.

12 I can go through the three causes of action with
13 respect to PCPC, but, frankly, I don't think it is at issue
14 because Ms. Simpson has not put forth any evidence. So if I
15 may reserve my time with respect to those, if that is
16 raised. But, again, Your Honor, they have not put forth any
17 evidence concerning the three causes of action. And as a
18 result, Your Honor, I would respectfully request that you
19 grant PCPC's special motion to dismiss.

20 THE COURT: All right. Thank you.

21 MR. BILLINGS-KANG: Thank you, Your Honor.

22 THE COURT: Counsel.

23 MR. LYONS: Thank you, Your Honor.

24 THE COURT: Sure.

25 MR. LYONS: Good afternoon again, Your Honor. My

1 name is Patrick Lyons. And I represent the plaintiff,
2 Ms. Denise Simpson.

3 THE COURT: Good afternoon.

4 MR. LYONS: Thank you. In this case, Ms. Simpson
5 alleges in her complaint that the Personal Care Products
6 Council or PCPC, along with Johnson & Johnson, defendants,
7 and Imerys Talc America over the course of about 40 years
8 conspired and collaborated to not only publish and fund
9 studies that would discredit the already published studies
10 about the dangers of talc, they hired scientists to perform
11 reviews. And they acted in this way, also releasing
12 information to the general public contrary to the already
13 published studies about the dangers of talc. Ms. Simpson
14 not only alleges that in paragraph 34 of her complaint. But
15 also has allegations in the three counts and the causes of
16 action she brings against PCPC, those are: Negligence,
17 fraud and conspiracy.

18 In all, every single one of PCPC's statements and
19 actions they took in conjunction with Johnson & Johnson and
20 Imerys over the course of 40 years were all motivated by the
21 private commercial interests of PCPC and its member
22 companies. And, therefore, none of the action or statements
23 fall under the protection under the DC Anti-SLAPP Act.

24 Now, I would like to just start by refuting just a
25 few points that was made by counsel for PCPC. Number 1, the

1 statute explicitly puts the initial burden on Personal Care
2 Products Council to provide a prima facie showing that it's
3 protected under the act. Number 2, counsel referred to
4 several cases from California, as well as the District of
5 Columbia Circuit. However, those cases are not applicable
6 here. California, for example, does not have the particular
7 provision, the private interest provision definition of
8 public interest that the District of Columbia Anti-SLAPP Act
9 does. So that entire definitional phrase is not included in
10 the California Anti-SLAPP Act. So every single California
11 case that has analyzed the Anti-SLAPP Act has not looked at
12 it through the lens of, well, is issue of public interest
13 described as this way or this way? So, here, the DC
14 Anti-SLAPP act is actually a little bit narrower in that
15 sense because it provides a very detailed definition of what
16 a public interest is and that excludes private interests,
17 such as those meant to promote the commercial interests of
18 the speaker. The DC Circuit cases that counsel for PCPC has
19 cited are no longer good law in plaintiff's -- plaintiff's
20 opinion because of Abbas -- the Abbas case from the DC
21 Circuit which was decided in 2015. And that is 783 F.3d
22 1328. In that case, the District of Columbia Circuit Court
23 held that a Federal court sitting in diversity may not apply
24 the Anti-SLAPP Act. So while the Court affirmed the
25 dismissal, it affirmed the dismissal on separate grounds,

1 Rule 12 and Rule 56 of the Federal Rules of Civil Procedure.
2 Counsel for PCPC does make mention that if trade
3 associations aren't allowed the protection of the Anti-SLAPP
4 Act, there is nothing else that is going to protect them.
5 That is frankly not true, because the District of Columbia
6 Rules of Civil Procedure provide for motions to dismiss
7 plaintiff's complaint under very similar circumstances if
8 they do not actually make a cause of action. Here PCPC has
9 not filed such a motion. I will note that a motion to
10 dismiss PCPC's fraud and civil conspiracy claims were
11 brought in a separate case, Oules versus Johnson & Johnson
12 and that motion was denied by Judge Holeman.

13 Now, I would like to start with the second element
14 of the prima facie case that PCPC must make in order to
15 prove that it deserves the protection of this act. And that
16 is that PCPC -- so let me just go back to what the Act
17 actually says. So it says a party may file a special motion
18 to dismiss any claim arising from an act in furtherance of
19 the right of advocacy on an issue of public interest. Now,
20 this provides for two elements. The first element is an act
21 in furtherance of the right of advocacy. And the second
22 element is on an issue of public interest. However, I will
23 say that the second element actually plays into the first
24 element. Because the full first element is an act in
25 furtherance of the right of advocacy on issues of public

1 interest. So determining whether or not PCPC's statements
2 and activities were truly directed towards an issue of
3 public interest are dispositive of the first element.
4 Because if the Court finds that PCPC's statements and
5 activities were indeed on issues of public interest, then
6 that goes back to the first element and we have to analyze
7 each and every single statement and activity over the course
8 of four decades. And we are talking about in a similar
9 case, documents that were produced -- about 80,000 pages of
10 documents from PCPC that implicate plaintiff's claims in
11 some way. That is not only to count the 800,000 documents
12 that were produce by the other defendants in a similar case.
13 So we are talking about having to go back through and look
14 at the statements and activities over the course of four
15 decades. This is not a typical case. For example, in the
16 other casus that have been cited by the District of Columbia
17 Court of Appeals, for example, Competitive Enterprise
18 Institute versus Mann, which was just a few weeks ago
19 actually. This was again a simple defamation action
20 involving two published articles. So it wasn't like we had
21 to go through 80,000 pages of documents and determine was
22 this statement in act of furtherance of the right of public
23 advocacy or was this statement an act in furtherance of the
24 right of public advocacy? So you had to look at two
25 articles and make that decision. So that case Doe versus

1 Burke, for example, involves an edit to a Wikipedia page.
2 So it is very simple to analyze, did those statements arise
3 from an act in furtherance of the public advocacy. Indeed,
4 Farah versus Esquire Magazine, it was again a defamation
5 case involving one single satirical article that was
6 published by Esquire Magazine. So just on that, we see the
7 differences in what a case involving a true Anti-SLAPP issue
8 looks like versus one that does not. That goes to the
9 example of what kind of claims are typically brought in
10 Anti-SLAPP lawsuits. And those are typically defamation and
11 related torts. We -- here the plaintiffs bring causes of
12 action found in negligence and in fraud. So these are not
13 the -- also not the typical claims that are brought in an
14 Anti-SLAPP lawsuit.

15 Now I will go and discuss why PCPC's statements
16 and actions alleged in Ms. Simpson's complaint are not on
17 issues of public interest. And here it is, that one
18 definition of what is an issue of public interest? And it
19 says a public interest is not to be construed to mean
20 private interests, such as statements directed primarily
21 towards protecting the commercial interests of the speaker.
22 As I mentioned before, again, this makes it a little
23 narrower. And in analyzing this element, the prime facie
24 case, the motivations of the speaker are very important.
25 And just that definition itself indicates that you have to

1 analyze what the motivations of the speaker were. Because
2 you have to determine whether the statements were made
3 primarily to protect commercial interests or the speaker's
4 commercial interest. The language of the Act itself also
5 makes it clear that you have to take a look at the
6 motivations of the speaker. It says an act in furtherance
7 of. In furtherance simply means the advancement of a scheme
8 or interest. So you have to look at the motivations of the
9 speaker. And here PCPC is a trade association that
10 represents its member companies. Inherently PCPC's member
11 companies are cosmetic companies that are commercial in
12 nature. PCPC, I don't dispute -- I don't believe would
13 dispute that Johnson & Johnson and Imerys Talc America are
14 commercial companies by nature. They are for-profit
15 corporations. And in this case, the products Johnson's Baby
16 Powder and Shower to Shower are at issue. And those are
17 products that are manufactured by the Johnson & Johnson
18 defendants. And in those products are talc, which is a
19 substance that is mined and provided to Johnson & Johnson by
20 Imerys Talc America. So these are inherently commercial
21 interests that the defendants have. And PCPC, as a trade
22 organization, naturally represents the interests of its
23 members. And it has an inherent private interest in
24 promoting the commercial interests of its members. That is
25 what trade associations do. This isn't, you know, an

1 indictment of trade associations. It is just an honest
2 discussion of whose interest they represent. It is their
3 member companies' commercial interests, not the public's,
4 not the government's. Inherently, trade associations are
5 built to represent the interests of their members. And
6 those are commercial interest in this case.

7 In fact, Mr. Pollak, the executive vice president,
8 states that the trade association -- PCPC is a trade
9 association that represents the other defendants. And they
10 advocate on issues of interest to some or all of its
11 members. Again, this is the issue at interest is directed
12 primarily toward protecting the commercial interests of its
13 members. PCPC website states that it represents the
14 industry on issues of interest to the cosmetic and personal
15 care industry. In another page on its website it states
16 that PCPC works on behalf of the industry to find solutions
17 that benefit the industry. Even PCPC's tax return, the form
18 990, states in its mission that PCPC represents the common
19 business interests of the personal care products industry.
20 So clearly PCPC as an organization is built to represent the
21 commercial interests of its members.

22 If Johnson & Johnson, Imerys Talc America did not
23 have commercial interests in protecting the products and the
24 substance involved in Ms. Simpson's complaint that she
25 alleges caused her ovarian cancer, PCPC would not have taken

1 any of the actions -- it would not have formed a talc
2 interested task force for the purpose of disseminating false
3 information, hiring scientists to conduct biased reviews and
4 generally releasing information to the public and the
5 government that was false or misleading, if it wasn't for
6 its member companies' commercial interests. And, Your
7 Honor, I would like to turn -- just to discuss -- again,
8 there are procedural safeguards that would protect Personal
9 Care Products Council absent the Anti-SLAPP Act. And it is
10 not like every state has an Anti-SLAPP Act, a little over
11 half do. Trade associations can take advantage of Rule 12,
12 Rule 56 of other rules to dismiss plaintiff's complaint, if
13 they truly believe they do not have any merit.

14 But the intent of the Anti-SLAPP Act, again, is
15 to -- is not to protect commercial interests. That is
16 completely different. The intent of the Anti-SLAPP Act is
17 to promote and protect honest public discourse about issues
18 of public interest and by specifically defining in a way
19 that is very different than every other Anti-SLAPP Act in
20 specifically defining what an issue of public interest is
21 and by stating that it is not to include private interest,
22 such as interests meant to protect the commercial interests
23 of the speaker, the DC Council meant to provide for a
24 situation exactly like this where the defendants, Johnson &
25 Johnson and Imerys Talc America, they do not claim they can

1 get the protection of the Anti-SLAPP Act for the exact same
2 statements and activities that PCPC -- what they undertook
3 with PCPC. But now PCPC claims it can claim the Anti-SLAPP
4 protection for the exact same activities that Johnson &
5 Johnson or Imerys would not be able to claim. So I think
6 this definitional exclusion of private interests is meant to
7 cover a situation like this. Again, trade associations are
8 meant to promote and protect the interest of its members and
9 these are inherently commercial interests.

10 So, for example, I remember a transitive property
11 for math. I am not very good at math, but this helped me
12 remember. If Personal Care Products Council is -- seeks to
13 protect its members' interests and its members seek to
14 protect their commercial interest, then PCP seeks to protect
15 and promote its member companies' commercial interest. So I
16 would also like to point out that -- the private interests
17 that are at issue here, such as statements meant to protect
18 the speaker's commercial interests as an example. And I
19 think it is an example that does fit in this case. But,
20 again, it is just an example of one type of private interest
21 that the act does not protect. And so here, even if the
22 wording of the example, such as protecting the speaker's
23 public interests -- private -- I mean, commercial interests
24 does not exactly fit, which, again, we believe it does fit
25 in this case, there is room to show that these private

1 interests which would not be protected by -- or any other
2 company or for any other individual, somehow should apply to
3 PCPC. Because PCPC advocated for a private commercial
4 interest of itself and its members, it does not deserve the
5 protection of the Anti-SLAPP act. And thank you, Your
6 Honor, appreciate your time.

7 THE COURT: Thank you.

8 Do you wish to respond?

9 MR. BILLINGS-KANG: Yes, Your Honor. Just a few
10 points. Counsel started off his response by indicating that
11 the onus is on PCPC to disprove it's targeting -- its
12 commercial interests. Again, I would submit that is
13 incorrect. And we know that from Doe against Burke, the
14 2014 case where the plaintiff had speculated that there were
15 some sort of pecuniary interest that had motivated Doe's
16 intent to quash the subpoena. The Court there noted that
17 you can't rely on the allegation or conclusory statements.
18 And the onus is, in fact, on the plaintiff to put forth some
19 evidence, some direct evidence linking the speech with the
20 commercial interest. So, again, I submit that is not a
21 correct characterization of that burden.

22 He also makes the claim that this is not a typical
23 case, that because this case involves 40 years of
24 statements, it involves 80,000 documents, it is unlike the
25 other cases where the issue may have arisen in a span of one

1 year or one blog entry or two blog entries. But, again, the
2 courts do not have that distinction in mind at all. There
3 is no dispositive case that suggests that duration has
4 anything to do with -- if anything, as the California courts
5 have guided us towards is that you have got to look at
6 this -- the speech is not through the lens of the plaintiff.
7 So what he is suggesting is, oh, a plaintiff can come here,
8 couch the complaint with many sort of causes of action,
9 bring in a duration of any kind and say it is not typical,
10 therefore the Anti-SLAPP act does not apply here. Again,
11 you can't look at, Your Honor, the form of the complaint or
12 look at it through the lens of the compliant. We have to
13 look at what speech are we talking about here. And they
14 have not met their burden in showing anything but
15 circumstantial indications of the inherent nature of PCPC.
16 Again, they just simply point to Mr. Pollak's declaration in
17 the website. And these are just circumstantial documents.
18 And a website that describes the inherent structure of PCPC.
19 And, again, I think that is dangerous to suggest as counsel
20 would claim that inherently, a trade association is
21 commercial, therefore, it cannot submit a special motion to
22 dismiss. I think the way the counsel crafted the language
23 is that we have to look at this exclusion from public
24 interest in a narrow fashion. Because as we know from case
25 law, the act is broad. And it should be construed broadly.

1 And that is because we want to again protect speech and not
2 stifle it. And we want to allow people -- even people whose
3 speech might have some sort of commercial element to it,
4 still be protected and still be able to participate
5 publicly.

6 And counsel even conceded that, that the exclusion
7 and the definition of public interest is narrow. He
8 mentioned that.

9 And then he also put forward the fact -- the claim
10 that, well, PCPC has other procedural safeguards in light of
11 the fact that it can't file a special motion to dismiss.
12 Well, that is not the purpose of the special motion to
13 dismiss. The purpose is to allow the speaker to
14 expeditiously get a disposition. The fact that there are
15 procedural safeguards, the fact that there might be
16 alternative ways to have a case dismissed or a case
17 concluded, runs afoul of the purpose of the Act, which
18 requires that a court take this into special consideration
19 which I respectfully thank you for and to consider what is
20 the speech here. So I'd submit that those other procedural
21 avenues should not even be considered in this argument.

22 And, finally, I'd like to rest with the muzzling
23 consequences, if the Court should agree with the plaintiff
24 here. What the plaintiff is suggesting is that your speech
25 is not protected, if, for instance, it was paid for. Again,

1 in Rivera that speech was paid for by Costco, the drug
2 monograph. We have another case called Industrial Waste --
3 out in California -- Industrial Waste & Debris Box against
4 Murphy, 4 Cal.App.5th 1135 and the pinpoint is 1150251. And
5 there the Court considered a private report actually -- a
6 private report that was paid for by a consultant who had
7 analyzed the plaintiff and other drug disposal statistics on
8 its disposal program. That private report was then given to
9 the speaker's client. And the client used that in
10 government form to essentially make the case that it should
11 be hired instead of the plaintiff. The plaintiff, again,
12 did not look at the competing body's interest, but rather
13 the speaker, the consultant there. In plaintiff's mind, in
14 Ms. Simpson's mind, just because a speech is paid for, again
15 has a financial element to it, that speech would not be
16 protected. But as the Court said there, "Whether speech has
17 a commercial or promotional aspect is not dispositive of
18 whether it addresses a matter of public interest." So,
19 again, you have to look at the entirety of the speech and
20 can't just simply say, oh, here is a website, here is their
21 organizational structure, therefore there is a commercial
22 element, the Act does not apply. No. You have to show
23 again -- and I submit it is a measuring stick, right. You
24 can't just simply say, oh, there is an element, there is a
25 scintilla of commercialism here. No. The act defines a

1 speech that is not incorporated as a public interest as one
2 that is directed primarily -- so, again, back to the
3 definition of primarily from OED, means mainly, for the most
4 part, to the greatest degree. So they have to put forward
5 evidence that tips the scales substantially in their favor
6 to link the speech with a pecuniary interest. And they have
7 not done that. Ms. Simpson has not done that.

8 I have already mentioned the magazines, which I
9 think would not be protected if plaintiff's argument would
10 hold weight here. And I think I would submit that even
11 public advocacy groups couldn't get their speeches protected
12 if, for instance, they were responding to competing
13 interests, which would inherently raise their profile, raise
14 their causes. And that is the particular example that we
15 saw in the ACLU's testimony between the right to life and
16 Planned Parenthood. Could plaintiff's argument be construed
17 to vitiate the protection afforded to these groups? I think
18 it would. I think by allowing this broad interpretation, it
19 would.

20 So again, Your Honor, taken to the logical extent,
21 I think this is dangerous grounds here. The argument that
22 no matter how tenuous the nexus between the speech and the
23 commercial interest, there is no protection by the Act and I
24 think that runs in contravention of the legislative history,
25 the purpose and the jurisprudence and especially the cases I

1 cited in California, while not authoritative, they provide
2 illuminating guidance, Your Honor. Thank you very much.

3 THE COURT: All right. Thank you.

4 MR. LYONS: Your Honor, may I address three quick
5 points?

6 THE COURT: Okay.

7 MR. LYONS: Thank you, Your Honor. We don't
8 suggest that any commercial interest, just any little bit of
9 commercial interest will tip the scale and not allow for the
10 protection of the Anti-SLAPP Act. But the definition says
11 that if it is motivated primarily by -- primarily to protect
12 the commercial interest. So there still has to be
13 primarily. We just argue that trade associations by nature
14 exclusively advocate on issues of private commercial
15 interest.

16 Number two, the cases from California that are
17 cited that discuss the public interest requirement under the
18 Act, again, they don't have the same definition of what an
19 issue of public interest is. So those cases that interpret
20 public interest are really not applicable here.

21 Number three, we did not have the benefit of
22 discovery. There are again, like I said, 80,000 documents
23 produced by PCPC and 800,000 produced by the other
24 defendants. At the time this was briefed, we did not have
25 that discovery. We do now. And we have some extra

1 discovery, so we could certainly brief this issue further.
2 But I'd say, I do not believe that the burden has shifted to
3 the plaintiff to proving its causes of action because PCPC
4 has not met that prima facie burden, which is in the
5 statute. Thank you, Your Honor.

6 THE COURT: All right. There were just a couple
7 of points that I want to go back to my chambers to take a
8 quick look at. And then I will be back. If the parties can
9 just return in 20 minutes, at a quarter to 4:00. We'll
10 stand in recess until then.

11 MR. LYONS: Thank you, Your Honor.

12 MR. BILLINGS-KANG: Thank you, Your Honor.

13 (Recess taken.)

14 THE DEPUTY CLERK: Calling Denise Cecelia Simpson
15 versus Johnson & Johnson 2016 CA 1931.

16 THE COURT: All right. Good afternoon. All
17 parties are present. Thank you for your patience. All
18 right. So just for the record, the Court is, of course,
19 using the statutory language, DC Code 16-5502 on special
20 motion to dismiss, specifically looking at subsection B, "If
21 a party filing a special motion to dismiss under the section
22 makes a prima facie showing that the claim at issue arises
23 from an act in furtherance of a right of advocacy on issues
24 of public interest, then the motion shall be granted, unless
25 the responding party demonstrates that the claim is likely

1 to succeed on the merits, in which case the motion shall be
2 denied."

3 So one of the issues that didn't come out as
4 strongly in the briefs, but clearly came out in terms of the
5 arguments is burden, who has the burden. And so the Court
6 just wants to cite to the case that the parties have
7 referenced, the Competitive Enterprise Institute versus Mann
8 case, which came out in December of 2016 by the DC Appellate
9 Court, 2016 DC.App Lexis 435, which states under the
10 District's Anti-SLAPP Act, the party filing a special motion
11 to dismiss must first show entitlement to the protections of
12 the act by making a prima facie showing that the claim at
13 issue arises from an act in furtherance of the right of
14 advocacy on issues of public interest, citing to the code.
15 Once that prima facie showing is made, the burden shifts to
16 the nonmoving party, usually the plaintiff, who must
17 demonstrate that the claim is likely to succeed on the
18 merits. If the plaintiff cannot meet that burden, the
19 motion to dismiss must be granted and the litigation is
20 brought to a speedy end. So the Court is using that statute
21 and that framework as interpreted by the Court of Appeals in
22 terms of the process of where the analysis starts and where
23 it goes in terms of burden. If, in fact, the prima facie
24 showing is established.

25 The Court also noted during oral argument -- so I

1 wanted to just make sure I made a point of addressing it --
2 there was back and forth about the use of California law.
3 And so -- the Abbas District Court case had language in it
4 that said, "In construing the Act, the Court cannot rely on
5 guidance from the DC Court of Appeals, which has not yet
6 published an opinion in interpreting the statute." Of
7 course, this was I believe a 2013 case, so this was prior to
8 some of the more recent litigation and decisions that have
9 come up by the Court of Appeals. And then the District
10 Court had said, Where, as here, the substantive law of the
11 forum state is uncertain or ambiguous, the job of federal
12 court is carefully to predict how the highest court of the
13 forum state would resolve the uncertainty or ambiguity.
14 With this in mind, the Court notes that the committee report
15 prepared on the Anti-SLAPP Act emphasize that the statute
16 followed the model set forth in a number of other
17 jurisdictions. The DC Court of Appeals has accorded great
18 weight to such reports in interpreting other DC statutes.
19 Therefore, where necessary and appropriate, the Court will
20 look to decisions from other jurisdictions, particularly
21 California, which has a well developed body of case law
22 interpreting a similar California statute for guidance and
23 predicting how the DC court of Appeals would interpret the
24 District's Anti-SLAPP statute.

25 Of course, the plaintiff points out that the

1 Circuit Court actually affirmed on different grounds and
2 specifically said that the first issue before the Court is
3 whether a Federal Court exercising diversity jurisdiction
4 may apply the DC Anti-SLAPP Act's special motion to dismiss
5 provision. The answer is no. Federal Rules of Civil
6 Procedure 12 and 56 establish the standards for granting
7 pretrial judgment to defendants in cases in Federal Court.
8 A Federal Court must apply those Federal Rules instead of
9 the DC Anti-SLAPP Act's special motion to dismiss provision.
10 So technically as a matter of law, this Court would not cite
11 to the District Court case. First of all, it wouldn't be
12 precedent for this Court anyway, as the parties know. If
13 anything, it would be persuasive, since they are not an
14 appellate court to this Court. And then in light of the
15 fact that the Circuit Court said District Court really
16 shouldn't have ruled on the issue of Anti-SLAPP anyway.
17 This Court doesn't decide this matter based on the District
18 Court Abbes language. Nevertheless, I read it. And the
19 Court actually agrees with what the District Court said. I
20 understand that I have no basis to cite to it, since in
21 essence, it was reversed, it was abrogated by the Circuit
22 Court. But what this Court does know is what the DC Court
23 of Appeals ordinarily does do and as it did in Mann itself
24 when it was looking at the issues that were raised in the
25 Mann case that was decided in 2016. For example, in

1 footnote 31, it did an analysis of what Colorado has done.
2 It also talked about what other states have done. For
3 example, the Mann case said other -- the Appellate Court,
4 said other states have adopted similar approaches.
5 California's Anti-SLAPP statute, which requires a showing
6 that there is a probability that the plaintiff will prevail
7 on the claim has been interpreted as requiring the plaintiff
8 to state and substantiate a legally sufficient claim, et
9 cetera. I am not going to cite the full language, because,
10 obviously, there was a really different issue that was being
11 contested in Mann, separate and apart from what is the
12 really contested issue here. The point being that to the
13 extent that this DC Court of Appeals has not specifically
14 ruled on the legal issue that is facing this trial Court,
15 this Court does look to other jurisdictions where this Court
16 finds language to be similar, although not identical. The
17 Court concedes that and plaintiff makes that point. But I
18 found the language of the California Anti-SLAPP statute to
19 be sufficiently similar. And the amount of litigation on
20 Anti-SLAPP challenges at the California courts to be of such
21 volume that this Court did find California court
22 interpretations of California's Anti-SLAPP statute to be
23 beneficial and persuasive, recognizing again it is not
24 identical language. But it was similar enough that this
25 Court did look to California law to be of help to this Court

1 in terms of trying to determine what the DC Court of Appeals
2 ultimately, would interpret. Obviously, the DC Court of
3 Appeals is the only ones who can tell me, ultimately, how
4 they would interpret it. All I can do is do my best to make
5 a proper interpretation and then the Court of Appeals can
6 instruct this Court whether it got it right or got it wrong.

7 So the Court just -- this Court just wanted to
8 highlight a couple of issues related to the burden and the
9 California law because those were matters that I had not
10 focused on extensively in preparing for today's hearing.

11 All right. Give me just a moment.

12 So turning first to whether the defendant PCPC,
13 who is the party who has filed this special motion to
14 dismiss has made a prima facie showing that the claim at
15 issue arises from an act in furtherance of the right of
16 advocacy on issues of public interest, the Court focuses
17 first on -- while the Court understands that full phrase
18 must be analyzed, much of the debate, both in the briefs and
19 in the oral arguments, focused on the definition of "on
20 issues of public interest." And as I just a moment ago
21 explained, since the DCCA has not yet ruled on the specific
22 issue, this Court -- our statute when looking at the
23 committee report has been modeled after Anti-SLAPP statutes
24 in other jurisdictions. And the Court -- this Court found
25 California's Anti-SLAPP statute to be sufficiently similar

1 to provide this Court some analysis that this Court found to
2 be helpful. So I turned to the California courts for
3 guidance on the issue, finding the language to be similar
4 and similar enough to provide guidance. In Choose Energy
5 versus American Petroleum Institute 87 F.Supp.3d 1218,
6 Northern District of California 2015, the US District for
7 the Northern District of California held that the defendant
8 trade association's conduct fell within the protection of
9 Anti-SLAPP because its conduct was noncommercial in nature
10 and addresses energy policy, an issue that is currently the
11 subject of pending legislative efforts and one of public
12 concern. The Court further noted that an issue of public
13 interest is an issue in which the public is interested. In
14 LA Taxi Cooperative Inc. versus Independent Taxi Owners'
15 Association of Los Angeles, 239 Cal.App.4th at 918, the
16 Court held that commercial speech about a specific product
17 or service is not a matter of public interest within the
18 meaning of the Anti-SLAPP statute even if the product
19 category is the subject of public interest and the products
20 are regulated by public agencies. That was citing to
21 Consumer Justice Center versus TriMedica International, 107
22 Cal.App4th at 595.

23 In this case, the LA Taxi case, the Court found
24 that commercial speech was not protected by the Anti-SLAPP
25 statute, because it was about a specific taxicab company,

1 not general public transportation by taxi companies. As the
2 Court has listened very carefully to each side of the
3 argument, it really -- plaintiff's arguments focused
4 primarily on this -- call it logical thinking which is if
5 the trade association is representing members and the
6 members have commercial interests, therefore the Court must
7 conclude that the trade association is a commercial
8 interest, as opposed to a public interest. However, the
9 Court distinguishes between when a trade association is
10 promoting a specific product or the benefits of a specific
11 product versus when a trade association is speaking more
12 generally about products and the health and safety of those
13 products as opposed to a specific commercial product named.

14 The Court does find in this case that PCPC has
15 made a prima facie showing that its alleged acts were made
16 in furtherance of the right of advocacy on issues of public
17 interest. So I am focusing now on the public interest
18 component. This is because plaintiff's complaint does not
19 allege that PCPC made any representations regarding a
20 particular product, only about the safety of talc in
21 general. Further, defendant PCPC is a nonprofit trade
22 association. It does not manufacture, design or sell any
23 products. As a result, PCPC does not have, this Court
24 concludes, a commercial interest to protect. While
25 plaintiff argues that PCPC does represent the commercial

1 organizations, that is Johnson & Johnson and Imerys, which
2 are profit-seeking corporations, this Court finds that
3 PCPC's own speech is not commercial in nature. Further,
4 PCPC's alleged acts fit squarely within the plain meaning of
5 the statute of issues of public interest. The statute
6 defines public interest to mean, an issue related to health
7 or safety. Here, the safety of talc is clearly an issue
8 related to health or safety.

9 I analyzed the public interest component first,
10 because I actually think that was of most import in terms of
11 the debate between the parties. That, obviously, is the
12 issue that would need to be resolved by the Court of Appeals
13 should this matter be appealed. All of the issues would
14 need to be resolved, but that one is clearly an issue of
15 first impression.

16 The Court now moves backwards in terms of the --
17 whether it is the -- this is an issue that arises from an
18 act in furtherance of the right of advocacy. I took it a
19 little bit out of order, just so that the Court could
20 address the most contentious issue first. And now I turn to
21 the first part.

22 In the briefs, the Court would conclude that the
23 plaintiff concedes that if PCPC's advocacy was based on
24 issues of public interest rather than on issues of private
25 commercial interest, then at least some of the advocacy of

1 PCPC would meet this element. Although, in its briefs,
2 plaintiff further argues that statements and actions among
3 PCPC and its members, the other defendants, would not meet
4 the element.

5 The statute defines act in furtherance of the
6 right of advocacy on issues of public interest in three
7 ways, as the parties have noted. One, a written or oral
8 statement made in connection with an issue under
9 consideration or review by a legislative or judicial body or
10 any other official proceeding authorized by law. This is
11 under the section 16-5501(1)(A)(i). Here, the complaint
12 alleges that PCPC formed the talc interested party task
13 force, a lobbying group regarding the safety of talc in
14 response to a study regarding the safety of talc and that
15 PCPC submitted scientific reports to government agencies.
16 Defendant argues that this allegation clearly constitutes an
17 act in furtherance of the right of advocacy in accordance
18 with the first potential definition of what qualifies and
19 the Court agrees. The Court finds that the alleged act
20 meets the definition as PCPC submitted reports to government
21 agencies.

22 The Court looks at the second manner in which it
23 might be established that the issue arises from an act in
24 furtherance of the right of advocacy, a written -- that is
25 number two, a written or oral statement made in a place open

1 to the public or public forum in connection with an issue of
2 public interest. This is section 16-5501 (1)(A)(ii). The
3 complaint alleges that PCPC released information regarding
4 the safety of talc to the public. The defendant argues that
5 this constitutes an act in furtherance of the right of
6 advocacy. Under the second definition, the Court does agree
7 with defendant. The Court finds that the alleged acts meet
8 the definition, as PCPC did release this information about
9 the safety of talc to the public.

10 Looking at the third potential way that this part
11 of the element can be established, any other expression or
12 expressive conduct that involves petitioning the government
13 or communicating views to members of the public in
14 connection with an issue of public issues. The complaint
15 alleges PCPC petitioned the government and communicated with
16 the public regarding the safety of talc. The defendant
17 argues this is an act in furtherance of the right of
18 advocacy. Under this third catchall definition, the Court
19 agrees, PCPC's actions fall within the catchall definition.
20 So under any of the three, the Court finds that plaintiff
21 meets the elements. The Court finds that the allegations in
22 plaintiff's complaint fit within the definition of act in
23 furtherance of the right of advocacy. And further having
24 found that they are on issues of public interest, I find
25 that the entire prima facie showing has been established by

1 the plaintiff. While plaintiff does argue both in her
2 briefs and oral arguments and in her complaint that PCPC and
3 the other defendants acted in concert to collectively defend
4 talc use and that these statements, in which they were
5 directed to the other defendants, that is, PCPC's statements
6 to the other defendants, that those would not be acts in
7 furtherance of a right of advocacy. The plaintiff fails to
8 show what these statements were or how they would further
9 her underlying claims. This Court find that plaintiff's
10 additional argument fails.

11 This Court, in light of the full analysis of the
12 elements that are required for the prima facie showing,
13 which is the plaintiff's burden initially, this Court does
14 conclude that the prima facie showing that a claim -- that
15 the claim at issue arises from an act in furtherance of the
16 right of advocacy on issues of public interest has been met.
17 The burden has been met by the plaintiff. That brings the
18 Court to then the motion shall be granted, unless the
19 responding party demonstrates that the claim is likely to
20 succeed on the merits, in which case the motion shall be
21 denied.

22 So the -- going back to the Mann case for a
23 moment -- again, citing to the Mann case, 2016 DC.App. Lexis
24 435, decided on December 22nd, 2016, the Court of Appeals
25 said that we conclude that in considering a special motion

1 to dismiss, the Court evaluates the likely success of the
2 claim by asking whether a jury properly instructed on the
3 applicable legal and constitutional standards could
4 reasonably find that the claim is supported in light of the
5 evidence that has been produced or proffered in connection
6 with the motion. This standard achieves the Anti-SLAPP
7 Act's goal of weeding out meritless litigation by ensuring
8 early legal review of the legal sufficiency of the evidence,
9 consistent with First Amendment principles while preserving
10 the claimant's right to a jury trial. The Court also said
11 that our analysis begins with the language of the statute,
12 which requires that to prevail in opposing a special motion
13 to dismiss, the opponent must demonstrate that the claim is
14 likely to succeed on the merits, as neither the phrase nor
15 any of its components is defined in the statute, we look to
16 the language of the statute by itself to see if the language
17 is plain and admits of no more than one meaning. Although
18 we can be confident that on the merits refers to success on
19 the substance of the claim, the meaning of the requirement
20 that the opponent demonstrate that the claim is likely to
21 succeed is more elusive. Use of the word demonstrate
22 indicates that once the burden has shifted to the claimant.
23 The statute requires more than mere reliance on allegations
24 in the complaint and mandates the production or proffer of
25 evidence that supports the claim. This interpretation is

1 supported by another provision in the act, section
2 16-5502(C) that states discovery upon the filing of a
3 special motion to dismiss until the motion has been disposed
4 of, unless it appears likely that targeted discovery will
5 enable the plaintiff to defeat the motion and that the
6 discovery will not be unduly burdensome. If evidence were
7 not required to successfully oppose a special motion to
8 dismiss under section 16-5502(B), there would be no need for
9 a provision allowing targeted discovery for that purpose.
10 Moreover, unless something more than argument based on the
11 allegations in the complaint is required, the special motion
12 to dismiss created by the Act would be redundant in light of
13 the general availability in all civil proceedings,
14 regardless of the nature of the claim of motions to dismiss
15 under Rule 12(B)(6).

16 The precise question the Court must ask,
17 therefore, is whether a jury properly instructed on the law,
18 including any applicable heightened fault and proof
19 requirements could reasonably find for the claimant on the
20 evidence presented. So the Court turns to the claims here,
21 that is, the -- because the burden now shifts to whether the
22 responding party has demonstrated that the claim is likely
23 to succeed on the merits, as I have defined it by the Court
24 of Appeals, how the Court of Appeals tells this Court how I
25 must analyze it. The plaintiff here must offer evidence on

1 the negligence claim, that is the first claim, of the
2 existence of a duty, violation of a standard of care, and
3 injury resulting as a proximate cause of the violation.
4 Here, plaintiff alleges that PCPC voluntarily undertook a
5 duty of care to plaintiff by promulgating standards, norms
6 and bylaws that govern control or inform the manufacturing,
7 design, labeling of its member companies. That is the
8 complaint, paragraph 79. Plaintiff further alleges that
9 PCPC had the means and authority to control the safety,
10 standards of the other defendants but breached its duty by
11 failing to ensure that they complied with the standards.
12 Defendant argues that the allegations are unsupported and
13 the Court agrees with the defendant's position.

14 The plaintiff has failed to establish if the jury
15 was properly instructed on the law, including any applicable
16 heightened fault and proof requirements, the Court has to
17 ask could a jury reasonably find for the claimant on the
18 evidence presented? Here, the plaintiff has failed to
19 establish that PCPC had any duty of care to her.

20 Furthermore, defendant submits an affidavit by showing that
21 PCPC has no authority to regulate its members and thus it
22 could not have prevented the sale of products. Plaintiff
23 presents nothing to counter that. Using the standard from
24 the Mann decision, the Court finds that on the claim of
25 negligence a jury properly instructed on the law could not

1 reasonably find for the claimant on the evidence presented.

2 Turning to the fraud claim. Plaintiff must offer
3 evidence establishing, one, a false representation; two, in
4 reference to a material fact; three, made with knowledge of
5 its falsity; four, with intent to deceive; and, five, action
6 is take in reliance upon representation. Plaintiff has
7 failed to address the specific elements and how she would
8 succeed on the merits. Defendant has argued both its
9 actions were protected under the First Amendment under
10 Noerr-Pennington doctrine and, further, plaintiff has no
11 evidence that defendant made any representations with the
12 knowledge of its falsity and is unlikely to have any
13 evidence that she relied on statements made by PCPC prior to
14 using talc. The Court agrees that plaintiff has not put
15 forward sufficient evidence on the two elements of fraud
16 highlighted by defendant to establish a likelihood of
17 success on the fraud claim, specifically that there needs to
18 be sufficient evidence where a jury properly instructed on
19 the law, could reasonably find for the claimant on evidence
20 presented on the issue of the element of -- that PCPC made
21 with knowledge of its falsity, whatever statement it was.
22 And there is not sufficient evidence that a reasonable juror
23 could find for the claimant on that element. And, further,
24 there is not sufficient evidence presented by the plaintiff
25 on the element where a reasonable juror could -- a jury

1 could reasonably find for the claimant on the element of --
2 that action was taken in reliance upon the representation,
3 by -- that is, action taken by the plaintiff in reliance
4 upon the representation by defendant PCPC. So the Court
5 finds using the standard taken from Mann that a jury
6 properly instructed on the law, could not reasonably find on
7 the fraud claim for the claimant on the evidence presented.

8 This brings the Court to the conspiracy claim.
9 Plaintiff must offer evidence establishing an agreement
10 between two or more persons to participate in an unlawful
11 act or in a lawful act in an unlawful manner, an injury
12 caused by an unlawful overt act or performed by one of the
13 parties to the agreement, pursuant to and in furtherance of
14 the common scheme. In addition, civil conspiracy depends on
15 the performance of some underlying tortious act. It is thus
16 not an independent action. It is rather a means for
17 establishing a vicarious liability for the underlying tort.

18 Plaintiff has failed to address the specific
19 elements of conspiracy. Defendant argues plaintiff cannot
20 present any admissible evidence that PCPC either performed
21 an unlawful act or a lawful act in an unlawful manner or
22 reached an agreement with one or more of the other
23 defendants, which was part of a common scheme for one of the
24 codefendants to commit an unlawful overt act against the
25 plaintiff. The Court agrees with the defendant. Plaintiff

1 has not presented sufficient evidence on the conspiracy
2 claim to establish a likelihood of success on the merits.
3 In other words, should a -- if a jury properly instructed on
4 the law were presented with the evidence that the plaintiff
5 has presented to this Court at this stage of this motion,
6 the jury could not reasonably find for the claimant on the
7 claim of conspiracy.

8 In essence, in plaintiff's brief, it just seems to
9 have foregone any argument on these points on the issue of
10 likelihood of success. But the Court is obligated, in my
11 opinion, to go through the entire analysis. Instead
12 plaintiff argues that she would be prejudiced without
13 additional limited discovery as provided for under the Act,
14 which, the Act does clearly provide that when it appears --
15 and this is under 16-5502(C)(2), when it appears likely that
16 targeted discovery will enable the plaintiff to defeat the
17 motion and that the discovery will not be unduly burdensome,
18 the Court may order that specified discovery be conducted.
19 Such an order may be conditioned upon the plaintiff paying
20 any expenses incurred by the defendant in responding to such
21 discovery. Here, plaintiff -- it is this Court's assessment
22 that plaintiff has not demonstrated what targeted discovery
23 would be needed to defeat the motion. Further, defendant
24 states and plaintiff not only did not oppose the statement
25 in its briefs but in court acknowledged that plaintiff has

1 already received thousands upon thousands of pages of
2 discovery in other similar litigation and even in this very
3 litigation. And despite having received all of that
4 discovery, there doesn't appear to this Court to be any
5 demonstration by the plaintiff of what additional targeted
6 discovery would assist the plaintiff in defeating the
7 motion. Seeing that the plaintiff did not oppose the
8 defendant's arguments that it could not succeed under the
9 claims, but instead requested additional discovery, the
10 Court finds that plaintiff cannot establish likelihood of
11 success on the underlying claims and the Court is not
12 ordering additional discovery as plaintiff has not
13 demonstrated what targeted discovery would be necessary to
14 defeat the motion, nor that additional discovery will likely
15 enable the plaintiff to defeat the motion.

16 So looking at the statute as whole, again, the
17 Court first found that the plaintiff did establish its --
18 and presented its prima facie showing that the claim at
19 issue arises from an act in furtherance of the right of
20 advocacy on issues of public interest, the motion to dismiss
21 must be granted unless the responding party demonstrates
22 that the claim is likely to succeed on the merits. I have
23 found that the responding party has not demonstrated that
24 the claim is likely to succeed on the merits. So it is
25 mandatory that the motion be granted. The exception being

1 if it appears likely that targeted discovery will enable the
2 plaintiff to defeat the motion and that the discovery will
3 not be unduly burdensome, the Court may order that specified
4 discovery be conducted, however, this Court has concluded
5 that it will not approve targeted discovery finding for the
6 reasons that I have already stated. That presents the Court
7 with the one outcome that the statute tells me to do and
8 that is I am granting the special motion to dismiss by PCPC.

9 So let's turn briefly in light of that to the
10 question of attorneys' fees. I will take brief argument on
11 that. I will hear from PCPC first.

12 MR. BILLINGS-KANG: Thank you, Your Honor. I
13 think that point is very clear in terms of a presumptive
14 award of attorneys' fees. It is mandated by the statute and
15 that is a question that was considered by the Court of
16 Appeals in Doe against Burke, not the 2014 opinion, but the
17 2016 opinion, in which the Court interpreted the statute to
18 entitle the moving party who prevails to a presumptive award
19 of reasonable attorney fees on request. And, Your Honor, we
20 have made that request respectfully. And we would ask that
21 the Court grant that motion. Thank you.

22 THE COURT: All right.
23 Plaintiff.

24 MR. LYONS: Your Honor, there is a provision
25 that -- there is presumptive award of attorney fees in cases

1 in which motion to dismiss is granted, unless special
2 circumstances exist. I do believe -- and plaintiff's
3 position is that this is a special circumstance. This is an
4 issue, as Your Honor mentioned, of first impression, has not
5 been litigated before. And plaintiff in filing its
6 complaint had no idea that a motion to dismiss based on the
7 Anti-SLAPP statute would be filed, did not anticipate this
8 issue. And we are not specifically filing this lawsuit with
9 the SLAPP provisions in mind. And we do believe there are
10 special circumstances given that this is the first time this
11 issue has been brought before the Court and a matter of
12 first impression and that attorneys' fees should not be
13 granted in this case.

14 THE COURT: Okay.

15 MR. LYONS: Thank you, Your Honor.

16 THE COURT: So the Court notes the standards the
17 attorneys cited to is the same standard the Court has
18 referenced in making a decision here, DC Code 16-5504, "The
19 Court may award a moving party who prevails in whole or in
20 part on a motion brought under section 16-5502 or section
21 16-5503, the cost of litigation, including reasonable
22 attorneys' fees." And cited to by defendant, Doe v. Burke
23 and the language referenced by plaintiff, that Court has
24 held that DC Code 16-6504(A) entitles the moving party who
25 prevails on a special motion to quash or dismiss to a

1 presumptive award of reasonable attorneys' fees on request
2 unless special circumstances would render such an award
3 unjust.

4 In the Doe case itself, the Court of Appeals did
5 not find special circumstances to render such an award
6 unjust, despite noting that the losing parties' attorneys
7 were employed by a public interest organization, that the
8 losing party was represented pro bono and that the losing
9 party had rejected an earlier settlement offer. The Court
10 awarded the prevailing party its attorneys' fees. So I have
11 heard the argument by plaintiff that this is a matter of
12 first impression, but this Court does not find that that
13 falls under this Court's interpretation of what would
14 constitute special circumstances. And so the Court is going
15 to follow the presumptive nature of the award and I am
16 granting an award of reasonable attorneys' fees, since it
17 has been requested by defendant. And defendant, you can
18 have -- how many -- do you need ten days?

19 MR. BILLINGS-KANG: Ten days, Your Honor, is
20 sufficient.

21 THE COURT: Ten days from today to make a filing
22 so that the Court can determine whether what you are
23 requesting are reasonable attorney fees.

24 All right. As you noted, I do have a court
25 reporter. I know you have been writing furiously, but if

1 anyone needs the transcript, I have asked her to be here in
2 light of the unique nature of my ruling. Okay.

3 Anything further from plaintiff at this time?

4 MR. LYONS: Nothing further, Your Honor.

5 THE COURT: Anything further from defendant?

6 MR. BILLINGS-KANG: Nothing further, Your Honor.

7 Thank you very much.

8 THE COURT: Thank you. Parties are excused and
9 thank you for accommodating my schedule.

10 MR. BILLINGS-KANG: Thank you, Your Honor.

11 (Proceedings adjourned.)

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CERTIFICATE OF REPORTER

I, Sherry T. Lindsay, an Official Court Reporter for the Superior Court of the District of Columbia, do hereby certify that I reported, by machine shorthand, in my official capacity, the proceedings had and testimony adduced, upon the hearing in the case of DENISE CECELIA SIMPSON, et al, V. JOHNSON & JOHNSON, et al, Civil Action No. 2016 CA 1931 B, in said Court, on the 13th day of January 2017.

I further certify that the foregoing 54 pages constitute the official transcript of said proceedings, as taken from my computer realtime display, together with the audio sync of said proceedings.

In witness whereof, I have hereto subscribed my name, this the 18th day of January 2017.


Sherry T. Lindsay
Official Court Reporter